84-1732

(2)

Supreme Court, U.S.
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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

FREIGHT CHECKERS, CLERICAL EMPLOYEES AND HELPERS LOCAL 856,
Petitioner,

vs.

BRENDA J. ALDERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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45 MP

QUESTIONS PRESENTED

1. Whether the holding in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1984), that the six months limitations period of 29 U.S.C. 160(b) governs with respect both to employers and unions in hybrid breach of contract/duty of fair representation cases should be applied retroactively where the effect of such retroactive application would be to *lengthen,* rather than shorten, the limitations period.

2. Whether summary reversal of the Ninth Circuit decision is appropriate under the circumstances of this case.

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No.

In the Supreme Court

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United States

OCTOBER TERM, 1984

FREIGHT CHECKERS, CLERICAL EMPLOYEES AND HELPERS, LOCAL 856,

Petitioner,

vs.

BRENDA J. ALDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Freight Checkers, Clerical Employees and Helpers, Local No. 856 (hereinafter "Union" or "Local 856") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 4, 1984.

OPINIONS BELOW

The Opinion of the Court of Appeals, which is not published, is attached hereto as Appendix A. The Court's Order denying the petition for rehearing is attached hereto as Appendix B. The Order and Memorandum Granting Defendants' Motions for Summary Judgment entered by the District Court for the

Northern District of California on May 25, 1983 is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 4, 1984. A timely petition for rehearing was denied on February 4, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Respondent Brenda Alderson was laid off by her employer, Crescent Truck Lines (hereinafter "Crescent"), on September 4, 1981, and she alleged in her complaint that on Sepbember 9, 1981 the Union refused to process a grievance over her layoff. At all pertinent times, the Union and Crescent were parties to a collective bargaining agreement covering Alderson's position.

Alderson filed a complaint against Crescent and Local 856 in the District Court for the Northern District of California on April 19, 1982. The complaint alleged that Crescent terminated her employment in breach of the collective bargaining agreement, and that the Union's refusal to process her grievance on September 9, 1981 constituted a breach of its duty of fair representation.

Both Crescent and Local 856 in due course filed motions for summary judgment on the grounds, *inter alia*, that the complaint was barred by the statute of limitations. On May 25, 1983, the District Court granted the motions as to both defendants, holding "that California Code of Civil Procedure § 1288, which provides for a 100-day statute of limitations, bars plaintiff's action *as to both defendants. See also, Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981)." (See Appendix C; emphasis added.)

Plaintifff appealed, and on December 4, 1984 the Ninth Circuit upheld the District Court as to the dismissal of the complaint against Crescent, but reversed as to the dismissal of the complaint

against Local 856. The Court reasoned that at the time the suit was commenced, the claim against Crescent was governed by the California 100-day statute of limitations for a petition to vacate an arbitration award, citing *United Parcel Service v. Mitchell*, 451 U.S. 56, 64 (1981). With respect to the claim against Local 856, the Court perceived the issue as being whether *DelCostello*, which had been decided after the District Court dismissed the complaint, should be applied retroactively to bar the complaint because it had been filed more than six months after accrual of the cause of action. The Court concluded:

> "*DelCostello* does not, however, control the result here, for this court has refused to give it retroactive application where its effect would be to shorten the applicable state statute." (Appendix A, p. 3)

In reaching this conclusion the court cited a Ninth Circuit opinion decided four weeks earlier and which at that point had not yet been published. *Glover v. United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. Nov. 8, 1984). A petition for rehearing was filed on behalf of Local 856 arguing that in fact the holding of the Ninth Circuit in *Glover* compelled a conclusion that District Court's dismissal as to the Union was proper, since the effect of retroactive application of *DelCostello* would be to lengthen, rather than shorten, the limitations period. (Appendix D) On February 4, 1985, the court denied without comment the petition for rehearing.

REASONS FOR GRANTING THE WRIT

A. The decision below is in conflict with the decisions of every other circuit which has considered the retroactive application of DelCostello, and more importantly, is in conflict with two decisions of the Ninth Circuit applying DelCostello retroactively under identical circumstances to those present here

Following the decision in *DelCostello*, the question of its retroactive application under the principles set forth in *Chevron Oil Company v. Huson*, 404 US. 97, 106-7 (1971) has been

expressly considered by nine circuit courts of appeal. Eight circuits have decided in favor of its retroactive application.[1] *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581 (3d Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Scott v. Local 863, International Brotherhood of Teamsters*, 725 F.2d 226 (6th Cir. 1984); *Landahl v. PPG Industries, Inc.*, 745 F.2d. 1312 (7th Cir. 1984); *Lincoln v. Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1984); *Rogers v. Lockheed Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983). In addition, one circuit has applied *DelCostello* retroactively without detailed analysis. *Assad v. Mt. Sinai Hospital Co., Inc.*, 725 F.2d 837 (2d Cir. 1984).

Only the Ninth Circuit has declined to apply *DelCostello* retroactively. *Barina v. Gulf Trading and Transp. Co.*, 726 F.2d 560 (1984); *McNaughton v. Dillingham Corp.*, 722 F.2d 1459 (1984) (*"McNaughton II"*), cert. denied ____ U.S. ____ 83 L. Ed. 2d 227 (1984); *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (1983), cert. denied ____ U.S. ____, 104 S. Ct. 1599 (1984). The effect of these cases in California has been to treat breach of contract claims against an employer as being governed by a 100-day statute of limitations and duty of fair representation claims against unions arising from the same operative facts as being governed by a three-year statute of limitations for actions created by statute. *Edwards v. Teamsters Local Union No. 36, supra* at 1040.

In two recent cases, however, the Ninth Circuit has held that *DelCostello* does apply retroactively to cases arising between August 13, 1981 and June 7, 1983. *Glover v. United Grocers, Inc., supra*, 746 F.2d. 1380; *Aragon v. Federated Dept. Stores, Inc.*, ____F.2d ____, 118 LRRM 2352 (1985) (Appendix E). The significance of those two dates is that on August 13, 1981, the

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[1] A thorough summary of the developments and analysis on this issue is contained in the recent decision of *Landahl v. PPG Industries, Inc.*, 745 F.2d 1312 (7th Cir. 1984).

Ninth Circuit in *Singer v. Flying Tiger Line, Inc., supra*, 652 F.2d 1349, 1353, stated that in the future it would apply the state statute of limitations for actions to vacate arbitration awards both to duty of fair representation claims against a union and to breach of contract claims against an employer. Then on June 7, 1983, the Ninth Circuit in *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1047, n. 6 ("*McNaughton I*"), stated that *Singer* had been in error in holding that duty of fair representation claims were subject to the short limitations period for a petition to vacate an arbitration award, and it treated such claims as being governed by longer state limitations periods.

In *Glover*, the cause of action for breach of the duty of fair representation arose during the period of time between *Singer* and *McNaughton I*. The court concluded:

> "Despite appellant's protestations, we have no difficulty giving *DelCostello* retroactive application in this case. Where we have refused retroactive application in the past, its effect would have been to shorten the applicable state statute. (Citations.) In the case before us, the cause of action accrued before *McNaughton I* abrogated *Singer* . . . when the applicable state statute for actions against both the union and the employer was twenty days. The retroactive effect of *DelCostello* is to lengthen, not shorten, the time in which Glover could have filed."

Glover, 746 F.2d at 1382.

In *Aragon, supra*, the Ninth Circuit was again confronted by a breach of contract/duty of fair representation suit arising between *Singer* and *McNaughton I*. The court noted:

> "The law of this circuit has been in a state of disarray, however, as to which state statute of limitations governs claims against a defendant union in a hybrid cause of action against an employer and a union accruing on March 12, 1982."

Aragon, ____ F.2d ____, 118 LRRM at 2355, Appendix E at A-18.

The court reviewed this confusing history in detail, and concluded that the result in *Glover* was correct. The court reasoned:

> "Untangling our past web of decisions and revealing that two widely divergent statutes of limitations—100 days on actions against employers and three years on actions against unions—governed during this shadowy period between *Singer* and *McNaughton I* would serve no useful purpose. It would only penalize the union and reward the employer for problems that arise, initially, only because of the employer's alleged breach of a collective bargaining agreement. The law of this circuit can be construed as applying the same statute of limitations to actions against both unions and employers at the time that Aragon's claim arose; we choose that construction."

Aragon, ____ F.2d ____, 118 LRRM at 2359, Appendix E at A-23.

In the present case, plaintiff alleged that Local 856 breached its duty of fair representation on September 9, 1981, when it refused to process a grievance over her layoff. Over seven months later, on April 19, 1982, plaintiff filed her action against Crescent and Local 856. Crescent has now been dismissed from the action. Under the reasoning of *Glover* and *Aragon*, and under the decisions of every other circuit to consider the issue, Local 856 should also be dismissed. For these reasons, certiorari should be granted to review the judgment below.

B. This case is appropriate for summary reversal

As discussed above, this case falls squarely within the holding in *Glover*. In its decision, the court below cited the then unpublished decision in *Glover* as representing the law of the circuit. A petition for rehearing was then filed on behalf of Local 856 pointing out what had apparently been overlooked by the Court, i.e. that this case fell within the time period for which *DelCostello* had been given retroactive application. (Appendix D)

While the petition for rehearing was pending, a different panel of the Ninth Circuit, noting the history of disarray on this issue in Ninth Circuit decisions, emphatically reaffirmed the holding in *Glover. Aragon v. Federated Dept. Stores, Inc., supra.* Almost one month after the decision in *Aragon*, the Court denied without comment the petition for rehearing in the case at bar.

Under these circumstances, the decision by the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision." U.S. Sup. Ct. Rule 17(a). It is recognized that this case does not have the widespread significance which would ordinarily cause this Court to grant certiorari and to issue a decision settling important questions of law. Because of the irresponsible nature of the Ninth Circuit in refusing to apply its own clear precedent to this case, however, petitioner has been subjected to a standard of justice lacking in predictability and consistency.

This is, therefore, an appropriate situation for the Court to exercise its power of supervision by granting certiorari and summarily reversing the decision of the Ninth Circuit. Although summary reversal is unusual, this step was taken in a similar situation in *United States ex. rel. Robinson v. Johnston,* 316 U.S. 649 (1942). There the Court granted certiorari and summarily remanded the case to the Ninth Circuit with leave to apply for a hearing *en banc,* "(i)n view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see *Robinson v. Johnston* (CCA (9th) 118 F.2d, 998, 1001, and *Crockett v. United States* (CCA 9th) 125 F.2d 547-549) and in view of this Court's decision in *Waley v. Johnston,* 316 U.S. 101 . . . ."

A similar conflict of views among the judges of the Ninth Circuit warrants similar treatment in the present case. Such action is necessary to assure a consistent application of the law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit, and the Court should summarily reverse that judgment, remanding the case for rehearing *en banc* before that Court.

April 30, 1985

Respectfully submitted,

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Attorneys for Petitioner

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 83-2126
D.C. No. C-82-1594-SMW

Brenda J. Alderson,
Plaintiff-Appellant

vs.

Crescent Truck Lines and Freight Checkers, Clerical Employees and Helpers, Local No. 856,
Defendants-Appellees.

[Filed Dec. 4, 1984]

Appeal from the United States District Court
for the Northern District of California

Honorable Spencer M. Williams,
United States District Judge, Presiding

Argued and Submitted: November 13, 1984

MEMORANDUM*

Before: MERRILL, KENNEDY, and ANDERSON, Circuit Judges.

Brenda Alderson brought suit against her former employer, Crescent Truck Lines, and her union, Freight Checkers, Clerical Employees and Helpers, Local No. 856, alleging wrongful termination by Crescent and breach of the duty of fair representation

* This disposition is not intended for publication and shall not be cited as precedent. Rule 21, Rules of the Ninth Circuit.

by the union. The district court granted motions for summary judgment, finding the action untimely as to both defendants below. Alderson appeals.

Appellant was laid off on September 4, 1981, and her last contact with the union was on September 9, 1981. She filed suit on April 19, 1982.

At the time suit was commenced, appellant's claim against Crescent was governed by the 100-day period of limitations set forth in section 1288 of the California Code of Civil Procedure (action to vacate arbitral award). *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 64 (1981); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348, 1351 (9th Cir. 1984); *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983), *reh'g denied*, 722 F.2d 1459 (1984), *cert. denied*, 53 U.S.L.W. 3286-87. Her action against the union, however, was governed by the three-year period of limitations of section 338(1) of the California Code of Civil Procedure (action upon liability created by statute). *Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 562 (9th Cir. 1984); *Edwards v. Teamsters Local No.36*, 719 F.2d 1036, 1040 (9th Cir. 1983), *cert. denied*, U.S. , 104 S. Ct. 1599 (1984).

After the action was filed, the Supreme Court held that an employee's action against either the employer or the union under section 301 of the Labor Management Relations Act is governed by the six-month limitations period of section 10(b) of that Act. *DelCostello v. International Brotherhood of Teamsters*, U.S. , 103 S. Ct. 2281, 2294 (1983). *DelCostello* does not, however, control the result here, for this court has refused to give it retroactive application where its effect would be to shorten the applicable state statute. *Cf., Glover v. United Grocers, Inc.*, No. 83-4202, slip op. 4940, 4941 (9th Cir. Nov. 8, 1984); *Barina*, 726 F.2d at 563-64; *Edwards*, 719 F.2d at 1040-41.

Appellant's suit, filed over seven months after the accrual of her cause of action, is timely as against the defendant union, but untimely as against the defendant employer. We therefore affirm the order of the district court granting summary judgment in favor

of Crescent. The order granting summary judgment in favor of the union is reversed. We express no opinion on the question whether the union is entitled to summary judgment on other grounds, leaving that issue to the district court in the first instance.

On this appeal Alderson shall pay the costs of Crescent Truck Lines, upon Crescent's filing a timely bill. The balance of costs on appeal shall be paid by the party incurring them.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 83-2126
D.C. No. C-82-11594-SMW

Brenda J. Alderson,
Plaintiff-Appellant,

vs.

Crescent Truck Lines and Freight
Checkers, Clerical Employees and
Helpers, Local No. 856,
Defendants-Appellees.

Filed Feb. 4 1985

Appeal from the United States District Court
for the Northern District of California

ORDER

Before: Merrill, Kennedy, and Anderson, Circuit Judges.
The petition for rehearing is DENIED.

Appendix C

In the United States District Court
For the Northern District of California
No. C 82 1594 SW

Brenda J. Alderson,
Plaintiff,

vs.

Crescent Truck Lines, et al.,
Defendants.

[Filed May 26, 1983]

Order and Memorandum Granting Defendants' Motions for Summary Judgment

On April 26, 1983, oral argument was heard on defendants' motions for summary judgment in this case. Defendant Crescent Truck Lines seeks summary judgment on the ground that plaintiff's action is untimely filed. Defendant Clerical Employees and Helpers, Local No. 856 seeks summary judgment on several grounds including the untimeliness of plaintiff's action. After careful consideration of the memoranda, affidavits and other material filed by the parties, the oral argument of counsel and the relevant authorities in this area, the court finds that plaintiff's action is untimely as to both defendants. Accordingly, the other defenses raised by Local 856 are not reached.

Plaintiff was employed by defendant Crescent for approximately nine years until she was laid off effective September 9, 1981. In April 1981, plaintiff went on maternity leave. While she was on leave, Crescent abolished the Billing Clerk position, the position then held by plaintiff. On July 28, 1981, plaintiff was reassigned to work as a Code Clerk in accordance with the seniority provisions of the collective bargaining agreement between the union and Crescent.

On September 2, 1981, Crescent informed plaintiff that they were going to lay her off because she could not adequately

perform her new duties. She immediately called Kathi Leal, the union's business representative, to initiate a grievance procedure to protest her termination. Plaintiff told Leal that her mistakes were due, in essence, to inadequate training. Plaintiff and Leal met that day to discuss the termination. Leal set up a meeting with Crescent management for the following afternoon.

Plaintiff was present for part of this meeting. During the meeting, management denied the claim of inadequate training. Crescent refused to permit plaintiff an extended qualifying period and on September 4, 1981 plaintiff was laid off.

Plaintiff next spoke to Leal on September 9, 1981. Leal informed plaintiff that she had lost her case. According to plaintiff's declaration, Leal stated that the union would not proceed further with her grievance. She then asked if she should submit a written explanation of her grievance. According to the declaration, Leal responded that it would do no good and make no difference.

The September 2nd discussion between Leal and Crescent constituted the first step of the grievance procedure provided for in the collective bargaining agreement. Under the agreement, plaintiff's grievance was deemed waived when neither her nor the union submitted it to the Joint State Committee within forty-five days of her layoff, that is, by October 19, 1981. On April 19, 1982, plaintiff filed the present action, challenging both her layoff by Crescent and the Union's efforts to represent her.

In moving to dismiss plaintiff's claim as untimely, both defendants rely on the recent Supreme Court case of *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). As stated by plaintiff in her opposition brief, the question is whether *Mitchell* "applies in a case where a plaintiff sues his or her union for breach of the duty of fair representation . . . and his employer for breach of contract and where the union withdraws the grievance *prior to* abritration." There is no Ninth Circuit authority that directly addresses this point. This court has recently ruled, in an unrelated action, that *Mitchell* is applicable in such cases. *Mylarski v. United States Postal Service*, No C 82 1081 SW (Filed April 26, 1983).

Moreover, Judge Schwarzer of this district has also come to the same conclusion in a recently released decision. *Williams v. United Airlines*, 30 ECP ¶ 33, 311 (N.D.Cal. Dec. 1982).

Based on these last two authorities, the court finds that California Code of Civil Procedure § 1288, which provides for a 100-day statute of limitation, bars plaintiffs action as to both defendants. *See also, Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981). Therefore,

IT IS HEREBY ORDERED that defendants' motions for summary judgment be granted.

Date: May 25, 1983

/s/ SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE

Appendix D

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United States Court of Appeals
For the Ninth Circuit

Case No.: 83-2126
DC No.: C-82-1594-SMW

PETITION FOR REHEARING

Brenda J. Alderson,
Plaintiff-Appellant,
vs.
Crescent Truck Lines and Freight Checkers,
Clerical Employees and Helpers, Local No. 856,
Defendants-Appellees.

INTRODUCTION

This Petition for Rehearing is filed by Defendant-Appellee Freight Checkers, Clerical Employees and Helpers Local No. 856 ("Union"), pursuant to Rule 40, Federal Rules of Appellate Procedure on the following grounds:

a. A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel;

b. An apparent conflict with another decision of the court which was not addressed in the opinion.

Both of the above grounds for the petition are supported by the decision of this circuit in *Glover v. United Grocers, Inc.*, No. 83-4202, 117 LRRM 3034 (Nov. 8, 1984). *Glover* was decided one month before issuance of the decision in the case at bar, and, as

discussed below, its holding compels a decision in the present case that the district court's dismissal as to the Union on the basis of the statute of limitations was proper and should have been affirmed.

Judgment in this case was entered by the circuit on December 4, 1984, and was served by mail. Pursuant to Rule 26(c), Federal Rules of Appellate Procedure the fourteen-day time limit for filing a petition for rehearing is extended by three days due to service by mail. Further, as set forth below in the Declaration of Counsel, the *Glover* decision did not come to the attention of counsel until the date of filing (December 19th) while reviewing latest decisions published in the Labor Relations Reference Manual.

ARGUMENT

The court reversed the district court's dismissal of the action against the Union, noting that this circuit has not applied the holding in *DelCostello v. International Brotherhood of Teamsters*, U.S. , 103 S.Ct. 2281, 2294 (1983) retroactively such as to provide a six-month statute of limitations governing a duty of fair representation claim against a union in cases arising prior to *DelCostello*. This court stated:

> "*DelCostello* does not, however, control the result here, for this court has refused to give it retroactive application where its effect would be to shorten the applicable state statute. Cf., *Glover v. United Grocers, Inc.*, No. 32-4202, slip op. 4940, 4941 (9th Cir. Nov. 8, 1984); *Barina*, 726 F.2d at 563-64; *Edwards* 719 F.2d at 1040-41." (Slip Op. at 2-3.)

In citing the *Glover* case, which at the time had not yet published, the court failed to recognize that the holding in *Glover* controls the result in this case in that retroactive application of *DelCostello* would have the effect of *increasing*, rather than decreasing, the applicable statute of limitations.

In *Glover* the cause of action for breach of the duty of fair representation accrued on August 9, 1982. At the time the law of the ninth circuit was that the statute of limitations for a duty of

fair representation complaint against a union was governed by the state statute for a petition to vacate an arbitration award (100 days under Cal.Code of Civ. Proc. § 1288.) *Singer v. Flying Tiger Line*, 652 F.2d 1349, 1353 (9th Cir., Aug. 13, 1981.)

The Court concluded:

> "Despite appellant's protestations, we have no difficulty giving *DelCostello* retroactive application in this case. Where we have refused retroactive application in the past, its effect would have been to shorten the applicable state statute. (Citations.) In the case before us, the cause of action accrued before *McNaughton I* abrogated *Singer, McNaughton I*, 707 F.2d at 1047, n.6, when the applicable state statute for actions against both the union and the employer was twenty days. The retroactive effect of *Del Costello* is to lengthen, not shorten, the time in which *Glover* could have filed." (*Glover*, 117 LRRM at 3035.)

As emphasized in the Union's Answering Brief, at page 8, the plaintiff's cause of action in the present case arose on September 4, 1981, and the Complaint was filed over seven months later, on April 10, 1982. At the time *Singer* was still the law of the circuit, and *McNaughton I* had not yet been decided. Thus this case falls squarely within the holding of *Glover* that *DelCostello* should be applied retroactively where to do so would lengthen, rather than shorten, the applicable state statute.

CONCLUSION

For the foregoing reasons, it is urged that rehearing be granted for the purpose of considering the application of *Glover v. United Grocers, Inc.* to the facts in this case.

Respectfully submitted,

BEESON, TAYER & SILBERT

By: /s/ FRANKLIN SILVER
Franklin Silver
Attorneys for Defendant-Appellee
Teamsters Local 856

DECLARATION OF COUNSEL

I, Franklin Silver, declare as follows:

1. I am an attorney for Defendant-Appellee Freight Checkers, Clerical Employees and Helpers, Local No. 856.

2. I first learned of the holding in *Glover v. United Grocers, Inc.*, on December 19, 1984, while reviewing recent decisions published in the Labor Relations Reference Manual. Immediately upon reading the case, I undertook to prepare this Petition for Rehearing.

Executed under penalty of perjury in San Francisco, California, on December 19, 1984.

/s/ FRANKLIN SILVER
Franklin Silver

Appendix E

Aragon v. Federated Dept. Stores

U.S. Court of Appeals,
Ninth Circuit (San Francisco)

Aragon v. Federated Department Stores, Inc., doing business as Ralphs Grocery Company, and Teamsters Local Union No. 572, et al., No. 83-6435, January 11, 1985

Appeal from the U.S. District Court for the Central District of California. Affirmed in part, reversed in part and remanded.

Full Text of Opinion

FERGUSON, Circuit Judge:—Ralphs Grocery Co. ("Ralphs") fired plaintiff Virginia Aragon ("Aragon") on December 1, 1981. Aragon, who was represented in her employment and in the grievance procedures stemming from her dismissal by a Local of the Teamsters ("Local"), achieved reinstatement in a less favorable position, without backpay, and on condition that she relinquish any further claims, on March 12, 1982. Discontented with this result, Aragon sued Ralphs for breach of its collective bargaining agreement in discharging her, and sued her union, the Local, for breach of its duty of fair representation in its pursuit of her grievance against Ralphs. In addition to this hybrid law suit against the union and the employer arising under the National Labor Relations Act, Aragon sued the Local's counsel for its alleged unsatisfactory work on her behalf.

It is the district court's judgment against Aragon and in favor of these few defendants, on these few claims, that Aragon now challenges on appeal. Aragon argues that the six-month statute of limitations prescribed by section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. section 160(b), which applies to hybrid suits against a union for breach of its duty of fair representation and against an employer for breach of its collective bargaining agreement, should not be applied retroactively to bar her suit against the Local. Construed liberally, Aragon's assertion

on appeal that this statute of limitations should be tolled as to Ralphs may be construed as a claim that the six-month statute of limitations referred to above should not be applied retroactively to bar her suit against her former employer, Ralphs. The resolution of these two claims depends in part on whether DelCostello v. International Brotherhood of Teamsters, 464 U.S. 151, 103 S.Ct. 2281, 113 LRRM 2737 (1983), which held that the six-month statute of limitations contained in the NLRA applies to hybrid suits of this sort, should be applied retroactively; and in part on whether prospective application of DelCostello would leave Aragon with a shorter or longer applicable state statute of limitations in DelCostello's stead.

Aragon also claims that she is entitled to damages for emotional distress based on the union's breach of its duty of fair representation. Additionally, she argues that her malpractice claim against the Local's counsel should not have been dismissed. In connection with this malpractice claim, Aragon asserts: (1) it should have been remanded; (2) it was not preempted by federal labor law; (3) she alleged facts sufficient to withstand a motion to dismiss; and (4) if the district court chose not to remand, it should have exercised pendent jurisdiction over this claim. Finally, Aragon seeks attorneys fees and costs of suit on this appeal.

FACTUAL AND PROCEDURAL HISTORY

Aragon worked for Ralphs for over fourteen years. Her employment commenced on May 1, 1967, and Ralphs discharged her on December 1, 1981. At the time of her discharge, Aragon was a cheese packer earning $11.95 an hour.

A written collective bargaining agreement between Ralphs and the Local was in force at the time of Aragon's termination. It controlled the terms and conditions of her employment as well as the grievance and arbitration procedure to be followed at her discharge.

The Local filed a grievance on Aragon's behalf. The grievance was heard, and decided, on March 12, 1982. It resulted in Aragon's reinstatement without backpay on March 15, 1982. This

time, she started a different job, on night shift rather than day shift, and she relinquished all her claims against Ralphs. She eventually left this job on April 2, 1982.

The Local and Aragon seem to agree that Aragon's cause of action accrued on March 12, 1982, when her termination grievance was settled at the hearing. Aragon filed her complaint in state court on March 24, 1983. The original complaint, however, was never served on any defendants. Aragon filed and served her first amended complaint on or about August 2, 1983.

All defendants named in the first amended complaint joined together and timely removed that action from the Superior Court to the United States District Court on August 31, 1983. The district court ruled against Aragon and in favor of all defendants on motions for summary judgment, for partial summary judgment, or to dismiss.

The district court granted summary judgment in favor of defendants Federated Department Stores, Inc. dba Ralphs Grocery Co. (Ralphs), Food Employers Council, Inc., Donald S. Prayzich, and Bob Rivera on each of Aragon's claims. As to these defendants, the court held: (1) the six-month statute of limitations prescribed by section 10(b) of the NRLA which applies to individual claims of breach of a collective bargaining agreement (DelCostello), barred Aragon's claim for breach of the collective bargaining agreement because it applied retroactively; and (2) federal law preempted each of Aragon's remaining state tort claims (breach of the implied convenant of good faith and fair dealing, misrepresentation preventing employment, malpractice, fraud, and intentional infliction of emotional distress).

The district court also granted partial summary judgment in favor of the defendant Local. As to this defendant, the court held that the NRLA's six-month statute of limitations, because it applied retroactively, also barred Aragon's breach of the duty of fair representation claim. Finally, the district court granted the motion to dismiss of the Local's counsel, who represented Aragon in her grievance and arbitration proceedings, for failure to state a claim upon which relief could be granted.

In her appeal, Aragon abandons several of her claims against other defendants. She also abandons several of her state law claims against the defendants who remain in the case. Thus, the only state law claim remaining on appeal is the malpractice claim against Counsel. The federal law claims remaining on appeal revolve around the appropriate statute of limitations to apply to the claims against Ralphs and the Local.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo,* Lane v. Goren, 743 F.2d 1337, 1339, 36 FEP Cases 1595 (9th Cir. 1984) (citation omitted). "Summary judgment is improper if tolling of the statute of limitations requires the resolution of disputed factual issues." Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033, 113 LRRM 3078 (9th Cir. 1983). "The search for the appropriate statute of limitations is a decision of law." Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036, 1039, 114 LRRM 3227 (9th Cir. 1983) cert. denied, 104 S.Ct. 1599, 115 LRRM 3192 (1984) (citation omitted). In this case, there are no relevant contested issues of fact as to either the tolling issue or the statute of limitations issue. Thus, we review these questions of law *de novo.*

"A ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a ruling on a question of law, freely reviewable by the court of appeals." Rae v. Union Bank, 725 F.2d 478, 479 (9th Cir. 1984). A motion to dismiss should not be granted unless it appears to a certainty that the plaintiff can prove no set of facts in support of his or her claim that would show entitlement to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 41 LRRM 2089 (1957); Rae v. Union Bank, 725 F.2d at 479. Thus, the district court's dismissal of Aragon's malpractice claim against Counsel is freely reviewable by this court.

DISCUSSION

1. ***Which statute of limitations governs Aragon's claim against the Local for breach of its duty of fair representation and***

against Ralphs for breach of its collective bargaining agreement, when the claim accrued on March 12, 1982?

Aragon claims that Ralphs breached its collective bargaining agreement with the Local by firing her. The parties do not dispute the facts relevant to determining whether Aragon's complaint was timely filed. Ralphs discharged Aragon on December 1, 1981. The Local filed a grievance on Aragon's behalf. The grievance was heard, and decided, on March 12, 1982. It resulted in Aragon's reinstatement without backpay on March 15, 1982. This time, she started a different job, on night shift rather than day shift, and she relinquished all her claims against Ralphs.

The Local asserts—and Aragon explicitly assumes as true—that Aragon's cause of action accrued on March 12, 1982, when her termination grievance was settled at the hearing. Cf., Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 561 and 562 n.2, 115 LRRM 3085 (9th Cir. 1984); Price v. Southern Pacific Transportation Co., 586 F.2d 750, 754, 100 LRRM 2671 (9th Cir. 1978).

After reinstatement, Aragon resigned on April 2, 1982. Aragon claims that she was forced to resign on this later date, and thus, that her resignation amounted to a constructive discharge. Aragon filed her complaint in this law suit on March 21, 1983. This was over fifteen months after her discharge, a little more than one year after her cause of action accrued, and almost one year after her subsequent resignation. The original complaint, however, was never served on any defendant. Aragon filed and served her first amended complaint on or about August 2, 1983. The parties seem to treat the March 24, 1983 date as the commencement of suit. As the discussion below reveals, however, both dates fall outside the statute of limitations.

In DelCostello, the Supreme Court held that suits for breach of a union's duty of fair representation and suits for an employer's breach of a provision of a collective bargaining agreement shall both be subject to the six-month statute of limitations period of section 10(b) of the NLRA, 29 U.S.C. section 160(b). Aragon argues that DelCostello should not be applied retroactively to bar

her suit, whose filing date admittedly falls outside the six month period. The Local argues that DelCostello should be applied retroactively to bar Aragon's suit or, if the six-month statute of limitations does not apply retroactively, then the applicable state statute of limitations is even shorter and would still bar Aragon's suit.

Until a few weeks ago, this circuit had forcefully, repeatedly, and uniformly denied DelCostello retroactive application. The following quote of an entire per curiam opinion exemplifies this uniformity:

> Plaintiff appeals from the district court's grant of summary judgment in this action, finding it barred by the six-month statute of limitations set forth in DelCostello . . . .
>
> The action was removed to federal court in 1981. This court has previously held that DelCostello does not apply retroactively. Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 115 LRRM 3085 (9th Cir. 1984); McNaughton v. Dillingham Corp., 722 F.2d 1459, 115 LRRM 2407 (9th Cir. 1984); Edwards v. Teamsters Local 36, 719 F.2d 1036, 114 LRRM 3227 (9th Cir. 1983), cert. denied, ...U.S. ...., 104 S.Ct. 1599, 115 LRRM 3192 . . . (1984).
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> We reverse and remand for a determination on the merits.

Rodriguez v. Union Carbide Corp, 735 F.2d 365, 365-66, 116 LRRM 2933 (9th Cir. 1984) (only citations are omitted).

Application of this blanket rule would deny DelCostello retroactive application. The six-month federal statute of limitations would thus be inapplicable; the relevant state statute of limitations would govern.

A very recent case, however, has fashioned a limited exception to this rule. Glover v. United Grocers, Inc., 746 F.2d 1380, 117 LRRM 3034, No. 83-4202 (Nov. 8, 1984), applied DelCostello retroactively. The court explained: "Where we have refused retroactive application in the past its effect would have been to shorten the applicable state statute . . . . The retroactive effect of DelCostello is to lengthen, not shorten, the time in which Glover

could have filed." If the state statute applicable to Aragon's case were shorter than the six-month federal statute of limitations, then this exception would make the six-month statute of limitations applicable. Aragon's claim would then be time barred.

Thus, the relevant inquiry is which state statute of limitations governed Aragon's claim against the Local and against Ralphs on March 12, 1982, the day that her cause of action accrued. If the state time limit was less than six months, then the six-month federal statute of limitations would govern; Aragon's claim would fail. If the state time limit was greater than six months, then it would govern; the viability of Aragon's claim would depend on how much time that state statute of limitations gave her.

The answer with respect to suits against employers seemed clear for several years. The statute of limitations applicable to a defendant employer in a hybrid cause of action, like Aragon's, which accrued on March 12, 1982, was California's 100-day limit on filing suit to vacate an arbitration award, Cal Civ. Proc. Code section 1288. McNaughton v. Dillingham Corp., 707 F.2d 1042, 1047, 113 LRRM 3017 (9th Cir. 1983), cert. denied, 53 LW 3289, 117 LRRM 2624 (U.S. Oct. 15, 1984) (McNaughton I"); Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 1353, 108 LRRM 2392 (9th Cir. 1981). Aragon's claim against Ralphs is therefore time barred whether DelCostello applies retroactively or not.

The law of this circuit has been in a state of disarray, however, as to which state statute of limitations governs claims against a defendant union in a hybrid cause of action against an employer and a union accruing on March 12, 1982. A brief history will illustrate the confusion.

On November 24, 1978, Price v. Southern Pacific Transportation Co., 586 F.2d 750, 100 LRRM 2671 (9th Cir. 1978), held that the statute of limitations in a hybrid suit under the Railway Labor Act was three years in California. This time limit was supplied by California's statute of limitations on actions on liability created by statute Cal. Civ. Proc. Code section 338. Price, 586 F.2d at 753.

On April 20, 1981, the Supreme Court decided United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 107 LRRM 2001 (1981). The Court held that the extremely short time limit applicable to actions to vacate arbitration awards—90 days under the New York statute at issue, 100 days in California—applied to hybrid suits of this type. Id. at 64. That decision applied explicitly only to defendant employers; only the defendant employer appealed and raised the issue. The decision was, however, written in broad terms, and seemed to imply in dicta that this extremely short time period should govern suits against defendant unions as well. Indeed, Mitchell's broad terms generated some of the confusion in later cases decided in our circuit.

On August 13, 1981, this circuit decided Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 108 LRRM 2392 (9th Cir. 1981). The Singer court held that, under the Railway Labor Act: "as Mitchell requires, . . . we shall treat suits against a union for a breach of the duty of fair representation and against an employer for a breach of a collective bargaining agreement under this [100 day, vacation of abitral awards] . . . limitations statute." Singer, 652 F.2d at 1353. (The distinction between suits arising under the Railway Labor Act, like Price and Singer, and suits arising under the NLRA, like Mitchell and Aragon, is irrelevant for our purposes. See Brina v. Gulf Trading and Transportation Co., 726 F.2d 560, 563 n.6, 115 LRRM 3085 (9th Cir. 1984). Singer thus held, based on reading Mitchell's dicta as binding precedent, that the staute of limitations applicable to defendant unions was 100 days.

Then came March 12, 1982, the day that Aragon's claim accrued. According to Singer, but not necessarily to Mitchell, Aragon had 100 days to file suit—and she missed her deadline.

On June 7, 1983, one day before the Supreme Court decided DelCostello, this circuit decided McNaughton I, 707 F.2d 1042, 113 LRRM 3017. The court in this case recognized the error in Singer, and undertook to "correct this error." McNaughton I at 1047 n.6. In place of the 100-day, state vacation of arbitration award limit, McNaughton I substituted Oregon's two year malpractice statute of limitations. (The McNaughton I decision

made no mention of Price's previously controlling holding that actions of this sort against a union are governed by state statutes of limitations on actions created by statute, rather than by state statutes of limitations on malpractice actions.) The claimant's cause in McNaughton I, which accrued on January 16, 1981 was therefore timely filed nine months later on October 20, 1981. Of course January 16, 1981, the date of accrual, is both pre-Singer's implication that the 100-day time limit applies and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer—and pre-McNaughton I's holding that a longer statute of limitations applied.

DelCostello was decided by the Supreme Court on June 8, 1983, one day after McNaughton I. Its decision that the federal, six-month statute of limitations is applicable on these cases does not affect this short history of the applicable California statute of limitations on March 12, 1982.

On November 3, 1983, Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036, 114 LRRM 3227 (9th Cir. 1983) was decided. Although the Edwards court cited McNaughton I, it ignored McNaughton I's holding that Oregon's two-year malpractice statute of limitations applied to claims against unions. Instead, Edwards held: "we reaffirm[!] Price's [pre-McNaughton] holding that the California statute of limitations applicable to a suit against a union for the breach of the duty of fair representation is the three year statute for actions 'upon a liability created by statute,' provided by Cal. Civ. Proc. Code § 338(1)," Edwards, 719 F.2d at 1040. Of course, in Edwards, the date of accrual of claimant's action was early 1981. This date of accrual, like the date of accrual in McNaughton I, is both pre-Singer's implication that the 100-day time limit applies and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer; pre-McNaughton I's holding that a longer malpractice statute of limitations applied; and pre-Edwards' holding that a longer, but different statute of limitations upon actions based on statutes applied.

The time period with which we are faced—actions accruing after Singer but before McNaughton I—has not yet been addressed by any of these cases. Nor does the next case in this history address the time period in which Aragon's claim falls. That next case is McNaughton v. Dillingham Corp., 722 F.2d 1459, 115 LRRM 2407 (9th Cir. 1984) ("McNaughton II"), decided on January 4, 1984. McNaughton II both reaffirmed McNaughton I (which applied the two year malpractice statute of limitations to actions against unions) and cited the recently decided Edwards case (which applied the three year statute of limitations on actions based on statutes to actions against unions) with approval. Thus, McNaughton II adds no further insight to the statute of limitations applicable to the date of accrual in Aragon's case.

The next case in the history is Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 115 LRRM 3085 (9th Cir., 1984), decided on February 23, 1984. The Barina court declined to apply DelCostello or Mitchell retroactively; the longer state statute of limitations therefore governed, but the court did not specify which statute of limitations that was. The date of accrual of claimant's cause of action in Barina was July 12, 1980. Id. at 562, n.2. This date of accrual, like the date of accrual in McNaughton I and in Edwards, is: pre-Singer's implication that the 100-day time limit applies; and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer; Pre-McNaughton I's holding that a longer malpractice statute of limitations applied; pre-Edwards' holding that a longer, but different statute of limitations upon actions based on statutes applied; and pre-Barina's holding that a longer, but unspecified statute of limitations applied.

Scoggins v. Boeing Co., 742 F.2d 1225, 117 LRRM 2468 (9th Cir. 1984), decided on September 18, 1984, follows the same pattern: a three year statute of limitations, under Washington state law, is applied to the action against the union; claimant's cause of action accrued, however, in August of 1980. Id. at 1228.

Several weeks ago, this circuit decided a case whose facts parallel the facts of our case. In Glover, the claimant's cause of

action accrued on August 9, 1982. This falls within the same window within which Aragon's accrual falls: post-Singer's holding that the 100-day statute of limitations applied; pre-McNaughton I's holding that a longer malpractice statute of limitations applied; pre-Edwards' holding that a longer, but different statute of limitations upon actions based on statutes applied; and pre-Barina's holding that a longer, but unspecified statute of limitations applied. Thus, Glover would seem to control this case; it held that the applicable California statute of limitations was 100 days.

Glover, however, fails to address one thing: this circuit has called the Singer holding incorrect. It was not simply amended or improved upon. It was basically overruled. This is what became of Singer's 100-day holding:

> In Singer . . . , a panel of this circuit believed that the rule in Mitchell extended to suits against the union . . . .
>
> . . . The [Singer] court's belief that Mitchell's holding applied to actions against a union for unfair representation apparently was based on an erroneous assumption that the union as well as the employer had appealed from the ruling of the court of appeals . . . . We now correct this error.

McNaughton I, 707 F.2d at 1047 n.6.

This court now faces a choice. We can follow Glover and hold that Aragon's suit against the Local and Ralphs is time barred under both the applicable 100-day state statute of limitations and the longer, six-month, federal time limit, applied retroactively. Or, we can address the issue that the Glover court declined to address: whether Singer should continue to bar claims against unions by its application of the extremely short, 100-day statute of limitations, despite the acknowledged error of that holding.

We choose the first approach. It comports with Glover, decided just a few weeks ago, and thus adds some needed consistency to this area of the law. It also comports with the federal labor relations policy that: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of theirs own choosing, and to

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA section 7, 29 U.S.C. section 157. Untangling our past web of decisions and revealing that two widely divergent statutes of limitations—100-days on actions against employers and three years on actions against unions—governed during this shadowy period between Singer and McNaughton I would serve no useful purpose. It would only penalize the union and reward the employer for problems that arise, initially, only because of the employer's alleged breach of a collective bargaining agreement. The law of this circuit can be construed as applying the same statute of limitations to actions against both unions and employers at the time that Aragon's claim arose; we choose that construction. We therefore affirm the district court's grant of summary judgment in favor of defendants Ralphs and the Local on the § 301 claim. Thus, we need not address Aragon's argument that she is entitled to damages of emotional distress on her breach of duty of fair representation claim.

2. *This short statute of limitations should not be tolled in this case.*

[2]On appeal, Aragon makes only one reference to tolling. She lists, as her last issue, "Whether the statute of limitations on plaintiff's cause of action against RALPHS for breach of the collective bargaining [sic] should be tolled." She never addresses the issue, never cites to any authority on this issue, and never raises any facts to justify tolling in her case. Her claim also fails on the merits.

Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 113 LRRM 3078 (9th Cir. 1983), controls the disposition of this issue. In Hub, the union—rather than an individual, like Aragon—sued the employer to enforce a collective bargaining agreement. That case, which was decided one day before DelCostello was decided, held that when a federal court borrows a state statute of limitations in claims arising under the Labor Management Relations Act, 29 U.S.C. section 185, the federal court may also borrow the state's tolling provisions. DelCostello, decided one day later, held that the federal courts

shall not borrow the state statute of limitations in actions against the employer and the union; thus, the federal courts may also be precluded from borrowing the state's tolling provisions. If, however, it is appropriate to borrow California's tolling provisions, Hub sets the analytical framework for doing so in a labor law case.

> California equitably tolls the statute of limitations during the pendency of an earlier action if there is "timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff." . . . The two actions [upon which the claimant basis the claim for benefit of equitable tolling] need not be identical . . . .
>
> Equitable tolling should not be applied in a manner that frustrates national labor-management policy. We believe that policy is fostered by having the NLRB attempt to resolve an issue before a party resorts to a section 301 action. Thus, if tolling is appropriate in this case, it would not be inconsistent with the constitution or with the applicable federal labor laws.

Id. at 1033 (citations omitted).

In Hub, the union filed an unfair labor practice charge with the NLRB years before it sued Hub for damages in federal court. The existence of these two actions meant that: (1) tolling the statute of limitations did not impede, but actively promoted, the federal policy of "having the NLRB attempt to resolve an issue before a party resorts to a section 301 action"; (2) the first action, though not identical to the second, provided the employer with the notice and lack of prejudice necessitated by state law; and (3) the first action showed the plaintiff's reasonable and good faith conduct. Thus, the statute of limitations was tolled.

In Aragon's case, however, no comparable filing by Aragon promoted federal labor concerns, notified the employer about the possible pendency of this action, or showed plaintiff's reasonable and good faith pursuit of her remedies. The only official action that she took that could possibly be construed as promoting federal policy, thereby allowing this court to apply California's

tolling provisions, is filing claims for unemployment benefits and pursuing these claims through appeal. In fact, it is this action that Aragon raised as a basis for tolling in the district court. These actions do not, however, rise to the level of promoting national labor-management policies in the same way that pursuing claims with the NLRB does. Nor do they notify an employer of the possible pendency of a law suit or show plaintiff's reasonable pursuit of her remedies. Thus, it would be inappropriate to toll Aragon's cause of action against Ralphs.

3. *The district court erred in dismissing Aragon's malpractice claim against the Local's counsel.*

The district court dismissed Aragon's malpractice claim against Counsel for failure to state a claim under Fed. R. Civ. Proc. 12(b)(6). Aragon argues that the claim should not have been dismissed. She asserts that her state malpractice claim is not preempted by federal labor law; that it alleges facts sufficient to withstand a motion to dismiss; and thus that the district court should have either retained the claim under its pendent jurisdiction or remanded the claim to state court. Counsel asserts that Aragon's claim arises under federal law and was properly removed to federal court, but that it was correctly dismissed for two reasons: (1) it was preempted by federal labor law; and, (2) it failed to state a cause of action.

a. *Federal law does not preempt the malpractice claim.*

The test for preemption in the labor law field demands that a balance be struck between competing interests.

> [T]he cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation. As we said in Vaca v. Sipes, 386 U.S. [171] at 180, 64 LRRM 2369 [1967], our cases "demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."

Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290, 300-01, 94 LRRM 2759(1977).

Based on this balance, federal law preempts a state tort suit by an employer for damages arising from the peaceful picketing of the company by labor unions, because this conduct is regulated by NLRA sections 7 and 8. 29 U.S.C. sections 157 and 158. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-48, 43 LRRM 2838 (1985). Federal law similarly preempts a state tort suit against a union complaining of the union's hiring practices and the complainant's resulting inability to obtain employment. This conduct was also regulated by NLRA sections 7 and 8, Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 694-95, 53 LRRM 2322 (1963). Federal law also preempts a former union member's law suit against his union for dismissing him from the union and procuring his dismissal from employment, where the resolution of the issue depends on the construction of the collective bargaining agreement and the union constitution. In such a case, again, the conduct "was arguably protected by § 7 or prohibited by § 8 of the [NLRA]." Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 293, 77 LRMM 2501 (1971).

Federal law does not, however, preempt a state tort action for infliction of emotional distress, where the action meets the strict requirement "that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." Farmer, 430 U.S. at 305. Nor did federal law preempt the cause of action asserted in International Association of Machinists v. Gonzales, 356 U.S. 617, 42 LRRM 2135 (1958).

> Gonzales was a suit against a labor union by an individual who claimed that he had been expelled in violation of his contractual rights and who was seeking restoration of membership. . . .

> The Gonzales decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights.

Borden, 373 U.S. at 696-97. This circuit, in Garibaldi v. Lucky Food Stores, 726 F.2d 1367, 115 LRRM 3089 (9th Cir. 1984), petition for cert. filed, 53 LW 310 (June 27, 1984), held that plaintiff's claim that he had been wrongfully discharged in violation of California state public policy also withstood a preemption challenge.

Garibaldi sets the analytical frame-work for determining whether federal law preempts Aragon's malpractice claim. Lucky Food Stores fired Garibaldi. Garibaldi sued for damages in state court, alleging that he was wrongfully discharged in violation of state policy. The action was removed to federal court; this circuit then decided that the action was improperly removed, and that the district court lacked jurisdiction. Id. at 1368.

The threshold issue in Garibaldi, like in all removal actions, was whether the removal jurisdiction was properly based on a federal claim stated in the complaint.

> However, where the state claim has been preempted by federal law, it does not follow that the federal court has jurisdiction. This circuit has repeatedly held that preemption, as a defensive allegation, is not grounds for removal . . . .
>
> Although ordinarily a preempted claim may not be removed to federal court, the "artful pleading" doctrine provides the rationale for the assertion of federal jurisdiction in some cases . . . . This doctrine allows the removing court to look at the true nature of the plaintiff's complaint when the plaintiff has attempted to avoid a federal cause of action by relying solely on state law in the complaint . . . . We have followed this doctrine in allowing removal based on preemption in certain labor cases . . . .

> Lucky Food Stores asserts that the suit is properly removed under the artful pleading doctrine because Garibaldi's claim is preempted. However, Lucky Food Stores has missed the second step in the analysis.

Id. at 1370 (citations omitted). That second step is looking at the true nature of the plaintiff's complaint. See also Hunter v. United Van Lines No. 83-5911, slip op. 4910 at 4919 (9th Cir. Nov. 5, 1984) ("Garibaldi made it clear that a state-law claim may be recharacterized as a federal claim only when the state-law claim is preempted by federal law *and* when it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered.") (emphasis in original).

In Garibaldi, the court held that "Garibaldi's allegation that he was discharged in violation of public policy comports with the limitations of the Farmer holding." 726 F.2d 1374. Federal law did not preempt the wrongful discharge claim, and removal was improper. The court stated:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in *tort*, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public—an interest which transcends the employment relationship.

Garibaldi, 726 F.2d at 1375 (emphasis in original).

The state malpractice claim that Aragon brings also falls within the limitations of the Farmer holding. It poses no significant threat to the collective bargaining process; the defendant is not even a party to the collective bargaining agreement. See Pedro v. Teamsters Local 490. 509 F.Supp. 83, 85 (N.D. Cal. 1981) ("labor organizations ... and employers are the only proper defendants in actions under" the NLRA; the union's attorneys are

not). The malpractice claim does not alter the economic relationship between employer and employee, it alters only the relationship between the former employee and a wholly separate entity, the union's counsel. The remedy is in tort, and it is based on the standard of care the attorney owes the client; it is not a contractual remedy under a collective bargaining agreement. It also furthers the state's interest in protecting the public from legal malpractice, an interest that transcends labor law.

The few factually similar cases decided in this circuit are in accord with this conclusion.[1] In Pedro v. Teamsters Local 490, 509 F.Supp. 83 (N.D. Cal. 1981), a discharged employee brought a suit against his employer for breach of the collective bargaining agreement, against the union for breach of the duty of fair representation, and against the union's attorneys who were retained to represent him in the arbitration proceedings. The court characterized the action against Pedro's attorneys as a state malpractice claim, and went on to hold that because this claim added the attorneys as defendants, "the . . . claim changes from a mere pendent claim to a claim adding pendent *parties*, as to whom there is no independent basis for federal subject matter jurisdiction." Id. at 85. This circuit's strong policy against pendent party jurisdiction formed the basis for the court's holding that pendent party jurisdiction was lacking as to the attorneys. The court concluded, however, that "[p]laintiff also is not without remedy in state court on his claims against the lawyer defendants." Id. at 86.

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[1] In Sklios v. Brotherhood of Teamsters and Auto Truck Drivers Local 70 of Alameda County, 503 F.Supp. 123 (N.D. Cal 1980), however, the court held that the state tort and contract claims asserted against all defendants—including the attorneys—were preempted by federal labor law. Id. at 124-25. "[T]he conduct alleged as a basis for the state law claims—wrongful discharge as the result of collusion between the employer and the union—clearly falls within the purview of federal labor regulation." Id. at 125. However, it appears that no separate state malpractice claim was brought against the attorneys in that case. More importantly, the decision in that case was reversed on appeal, without a published opinion. 672 F.2d 923 (9th Cir. 1982).

In Weitzel v. Oil Chemical & Atomic Workers International Union, 667 F.2d 785, 109 LRRM 3033 (9th Cir. 1982), Weitzel filed suit against his union for breach of the duty of fair representation and against the union's law firm for legal malpractice. This circuit affirmed the district court's dismissal of the claim against the union, but reversed the dismissal of the claim against the attorneys. "We conclude that summary judgment was inappropriate because genuine issues of fact remained in the case, both as to the breach of an attorney-client relationship and as to causal relationship of the breach, if any, to the plaintiff's alleged lack of success." Id. at 787. Thus, these decisions also support the conclusion that Aragon's malpractice claim is not preempted.

Because federal law neither preempts the state malpractice claim nor provides an independent federal remedy in its place, the district court erred both in retaining jurisdiction over this state law claim and in dismissing it for failure to state a claim.

b. *Aragon's malpractice claim should have been remanded to the state court.*

Pendent jurisdiction depends upon the federal court's jurisdiction over one claim, to which the second, nonfederal claim may be appended.

> Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a [federal] claim . . ., and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court.

United Mine Workers v. Gibbs, 383 U.S. 715, 725, 61 LRRM 2561 (1966) (footnote omitted; emphasis in original). See also Pedro, 509 F.Supp. at 85.

Aragon's federal claim against the Local for breach of its duty of fair representation and against Ralphs for breach of the collective bargaining agreement are time-barred. Thus, no independent federal claim confers subject matter jurisdiction on the federal court. Without a federal claim upon which to append the

related state cause of action, the federal court has no basis for asserting jurisdiction over Aragon's malpractice claim. But see Weitzel, 667 F.2d 785, 787, 109 LRRM 3033 (appellate court reversed and remanded—apparently to the district court—the former employee's malpractice claim against the union's law firm for the determination of a factual issue as to whether an attorney-client relationship existed and for a related state law issue regarding the statute of limitations). Pendent jurisdiction is therefore inappropriate in Aragon's case.

Because Aragon's malpractice claim was not preempted by federal law, and because there exits no independent basis of federal jurisdiction over Aragon's hybrid claim against the Local and Ralphs, the district court had no jurisdiction over this claim. It should be remanded to the district court with instructions to remand to the California state court. It is the province of that state court, not the district court, to determine whether Aragon has alleged facts sufficient to withstand a motion to dismiss. See Garibaldi, 726 F.2d 1367, 1376 ("Removal [of state wrongful discharge claim] was improper. Because the district court had no jurisdiction over this case, we reverse and remand to the district court with instructions to remand to the California state court.")

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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No. 84-1732

In The
Supreme Court of the United States
October Term, 1984

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FREIGHT CHECKERS, CLERICAL EMPLOYEES AND HELPERS, LOCAL 856,

Petitioner,

vs.

BRENDA J. ALDERSON,

Respondent.

—o—

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

—o—

RESPONDENT'S MEMORANDUM IN OPPOSITION

—o—

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S MEMORANDUM IN OPPOSITION

STATEMENT

Respondent Brenda Alderson was a long time employee of Crescent Truck Lines ("Crescent"), being employed at various clerical positions from 1973 until her layoff on September 4, 1981. During this period, Alderson's positions were covered by a collective bargaining agreement between Crescent and Petitioner Freight

Checkers, Clerical Employees and Helpers Local 856 ("Local 856"). In July 1981, prior to her ultimate layoff, the clerical position she had occupied with Crescent was abolished, and she exercised her seniority to be demoted or "bump" into a code clerk position. However, she was given incorrect coding instructions and was not given proper training.

On September 2, 1981, Alderson was told by the company that she would be laidoff, allegedly because she could not do the job. Alderson immediately initiated the grievance procedure by notifying her business agent at Local 856. A meeting was held between management and the union on September 2, 1981. Alderson was not notified about the results of the meeting. Alderson finally was able to reach her business agent by telephone on September 9, 1981, after repeated efforts. The business agent was hostile and angry and told Alderson that the union would not process the grievance further. No explanation was given.

Alderson filed a complaint against Crescent and Local 856 in the United States District Court for the Northern District of California on April 19, 1982. Alderson's complaint alleged that she was wrongfully terminated by Crescent and that Local 856 breached the duty of fair representation when it refused to process her grievance.

On motions for summary judgment in the district court, Crescent and petitioner argued that the complaint was barred by the statute of limitations. The district court ruled for Crescent and petitioner, concluding that the applicable statute of limitations for both defendants

was the 100-day limitation under California Code of Civil Procedure Section 1288. Pet. App. A-6-7.

The Court of Appeals for the Ninth Circuit reversed as to the dismissal of the complaint against Local 856, holding that respondent's action against the union was "governed by the three-year period of limitations of Section 338(1) of the California Code of Civil Procedure (action upon liability created by statute). *Barina v. Gulf Trading & Transportation Co.* (CA9 1984), 726 F.2d 560, 562; *Edwards v. Teamsters Local No. 36* (CA9 1983), 719 F.2d 1036, 1040, *cert. denied,* — U.S. —, 104 S.Ct. 1599 (1984)." App. A-2. Finding that the three-year period of limitations was applicable, the court refused to give retroactive application to *DelCostello v. International Brotherhood of Teamsters* (1983), — U.S. —, 103 S.Ct. 2281. Pet. App. A-2.

Petitioner's petition for rehearing was summarily denied on February 4, 1985. Pet. App. A-4.

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REASONS FOR DENYING THE WRIT

The Decision Of The Court Of Appeals Is A Conflict Between Different Panels Of The Same Court Of Appeals, Does Not Conflict With Any Other Court Of Appeals, And Is A Conflict Over An Issue That Is Narrowly Confined And Not Apt To Have Continuing Future Consequences.

1. Petitioner seeks review most "importantly" because, it contends, two decisions of the Ninth Circuit conflict with the decision of the Ninth Circuit panel in the

instant case. This argument is squarely rejected under Rule 17. Rule 17.1(a) contemplates a conflict between decisions of two or more courts of appeals, and not conflicting decisions of panels within a circuit. See *Wisniewski v. United States* (1957), 353 U.S. 901, 902, 77 S.Ct. 633, 1 L.Ed.2d 658; Harlan, *Manning the Dikes* (1958), 13 Record NYCBA 541, 552. Such conflicts are left to the court of appeals itself to resolve.

The essence of the dispute petitioner seeks to have reviewed is the Ninth Circuit panels' disagreement as to whether the three-year or the 100 day statute of limitations was the applicable statute against unions in California for duty of fair representation cases arising during the brief period between its decision in *Singer v. Flying Tiger Line, Inc.* (CA9 1981), 652 F.2d 1349 and its decision in *McNaughton v. Dillingham Corp.* (CA9 1983), 707 F.2d 1042. This is clearly insufficient grounds to grant the writ.

Petitioner's reliance on *United States ex re. Robinson v. Johnston* (1942), 316 U.S. 649 is completely erroneous. There the Court granted certiorari and summarily remanded the case because of its parallel decision in *Waley v. Johnston* (1942), 316 U.S. 101, involving the same issues.

2. Petitioner claims that the decision below is in conflict with other circuit courts of appeals because they have decided differently on the retroactivity of *DelCostello*. This argument totally ignores the fact that all the courts of appeals have to apply the principles set forth in *Chevron Oil Company v. Huson* (1971), 404 U.S. 97, to the unique contexts facing their circuits. To not do so

would bring them in conflict with this Court's decision on the issue of retroactivity. Thus there is no conflict among the circuits since all the circuits including the Ninth Circuit resolved the retroactivity question by weighing the three factors specified in *Chevron* to the unique situations in their circuits.

The situations were vastly different among the different circuits. For example, in the Ninth Circuit, a three year statute of limitations had been firmly established in *Price v. Southern Pacific Transportation Co.* (CA9 1978), 586 F.2d 750, while in the Seventh Circuit there had been no previous statute of limitations established except an unstable decision of the Wisconsin Supreme Court. *Landahl v. PPG Industries, Inc.* (CA7 1984), 745 F.2d 1312. Obviously applying the same standards to different situations would result in different conclusions, but does not constitute a conflict among the circuits.

The fact that this Court has denied certiorari twice on this same issue in *McNaughton v. Dillingham Corp.* (CA9 1984), 722 F.2d 1459, *cert. denied,* — U.S. —, 83 L.Ed.2d 227 (1984) and *Edwards v. Teamsters Local Union No. 36* (CA9 1983), 719 F.2d 1036, *cert. denied,* — U.S. —, 104 S.Ct. 1599 (1984) would indicate that frivolousness of the Petition.

3. If there is arguably a conflict between the decisions of the courts of appeals, the impact of the conflict is narrowly confined and is not apt to have continuing future consequences. Certiorari should not be granted in this situation. Harlan, *Manning The Dikes* (1958), 13 Record NYCBA 541, 552; Stern, *Denial of Certiorari Despite a Conflict* (1953), 66 Harv L Rev 465, 470. This case

clearly involves an issue that will no longer be a live one since the limited number of cases involving the retroactivity of *DelCostello* has just about been exhausted. Petitioner has further narrowed the issue to involve cases only arising between the Ninth Circuit's decisions in *Singer* and *McNaughton*. This is clearly not an important issue that warrants review by this Court.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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May 24, 1985